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No. 422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

FEDERAL TRADE COMMISSION, *Petitioner*

v.

CONSOLIDATED FOODS CORPORATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR CONSOLIDATED FOODS CORPORATION

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BRIEF FOR CONSOLIDATED FOODS CORPORATION

Most of the Government's brief is devoted to the proposition of law embodied in the following statement by the Seventh Circuit:

> "Undoubtedly there are situations resulting from acquisitions or mergers in which business reciprocity has the effect of substantially lessening competition or can be so utilized. Where the probability of such an effect arising out of a merger or acquisition is demonstrated the requirements for application of Section 7 are satisfied." (329 F.2d at 626; R. 2692)

Consolidated does not quarrel with this proposition. Accordingly, the real and only issue to be decided by the Court is whether probability of effect is proved in this case.

And on that issue we squarely challenge the assumption—which is the major premise of the Government's argument—that Consolidated's purchases from its suppliers actually create a "power" which will force or induce them to buy substantial amounts of dehydrated onion and garlic from Gentry.

The question presented is whether the Seventh Circuit was correct in holding that the Federal Trade Commission relied on "future possibility based on conjecture and speculation"[1] and failed to prove that reciprocal buying will result from the Consolidated-Gentry merger and that it will probably be sufficient to cause a substantial lessening of competition in the sale of Gentry's products.

THE HEART OF THE CASE

Our task is not to argue the pros and cons of person-to-person reciprocity; neither is it to join issue on the broad battleground of the legality of business reciprocity under all the antitrust laws. We are concerned with the facts of this Section 7 case; what we argue is this:

1. The reciprocity-creating potential of any company's purchases is unknown—it can only be determined by proof of market structure and market behavior.

2. There is no way to determine whether purchases from food processors create a dehydrated onion and garlic sales-inducing power except from the record in this case.

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[1] 329 F. 2d 623, 627; R. 2693. The Seventh Circuit's decision will hereafter be cited only by reference to the record pages where it appears.

3. The Commission had the burden of proving by substantial, probative evidence that Consolidated's purchases from food suppliers would probably obtain substantial sales for Gentry, and it failed to discharge this burden.

4. The Commission ignored the evidence and based its decision on assumption; its actual standard was possibility of some effect rather than probability of substantial effect.

The Government, like the Commission, simply assumes that food processors will automatically buy their ingredients from their customers; most of its arguments are devoted to the question of what may happen when there is reciprocal buying. But assumptions as to reciprocal buying are particularly suspect among food processors, where profit margins are low and quality is all important. As this record shows, purchasing decisions are not so easily swayed by factors alien to price, service and quality, particularly where the cost of being swayed may well be reflected in higher prices or lower quality, and thus hurt the purchaser in his business.

The Government's case is not helped by analogizing mergers creating "reciprocity opportunity" to tying agreements, requirements contracts or vertical mergers. As to the latter three, foreclosure effect is apparent and automatic; it need only be measured—not so with a merger creating "reciprocity opportunity," where actual reciprocal buying and its effect must be proved. The real similarity between reciprocity and tying agreements is that the latter cannot be presumed from the simple fact of sales of two products to one customer; so it is that reciprocity—and certainly substantial effect—cannot be presumed simply because a supplier does or could buy from his customer.

The Government's Reliance on Speculation

The Federal Trade Commission, in a three-out-of-five decision,[2] bypassed the record, disregarded the evidence and based its conclusion with respect to the critical Section 7 effect issue on the assumption that Consolidated's purchases would obtain substantial sales for Gentry. We say this without fear of challenge because the decision is silent on record proof in support of the assumption. But Section 7, even though it looks to the future, surely does not countenance the substitution of speculation for proof on the critical fact issue of probability of substantial effect.

The reliance on speculation is continued in the Government's brief before this Court. The liberal use of such words as "may," "might," "could be" and "reciprocity opportunity"[3] continually underscores the fundamental defect in the Government's argument. That defect is spotlighted by the last sentence of the brief, which summarizes the Commission's decision thusly:

> "• • • [T]he effect of the merger was substantially to enhance the *possibility* that reciprocal buying would occur." (Br. 53; emphasis added)

We agree that this is precisely what the Commission concluded—that the possibility of reciprocal buying made this merger bad. But Section 7 is concerned, as this Court has repeatedly said, not with possibilities but with probabilities.

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[2] Commissioner Anderson (the most experienced member in point of tenure) dissented and Commissioner Higginbotham did not participate.

[3] *E.g.*, Br. 9, 12, 17, 20, 23, 29, 31, 32, 47, 49. The Solicitor General's brief is cited as "Br."; the brief *amicus curiae* filed by Trabon Engineering Corporation, *et al.*, is cited as "Trabon Br."

The Real Question Requires an Appraisal of the Record

Outside of this record, there is no empirical evidence and no body of expert study to utilize in evaluating Consolidated's alleged reciprocal buying power. The record does provide an excellent proving ground, since both of the so-called forces which allegedly motivate reciprocal buying ("overt reciprocity" attempts, where pressure or persuasion is applied, and "tacit accommodative reciprocity," where it is alleged that the supplier automatically buys from his customer without anything being said) existed from 1951 (when the merger occurred) to 1960 (when the record was closed).

Consolidated did try to use its purchases to get sales for Gentry. Further, there were many food processors using dehydrated onion and garlic who were actual or potential suppliers to Consolidated. According to the Government's theory of "tacit reciprocity" each of them should have been literally knocking down Gentry's door to purchase its onion and garlic. Moreover, the Government argues that the dehydrated onion and garlic industry is peculiarly susceptible to reciprocal buying because Gentry's competitors are few and nondiversified.

This, then, is the perfect setting—and what was the effect of the alleged purchasing power? The Commission did not pause to ask. The Seventh Circuit did—and the answer provided by the record was that the alleged power had no effect of consequence. The Seventh Circuit recognized that Consolidated had proved in detail that its purchases from food processors had not produced and would not produce substantial sales for Gentry. There is no reason to believe

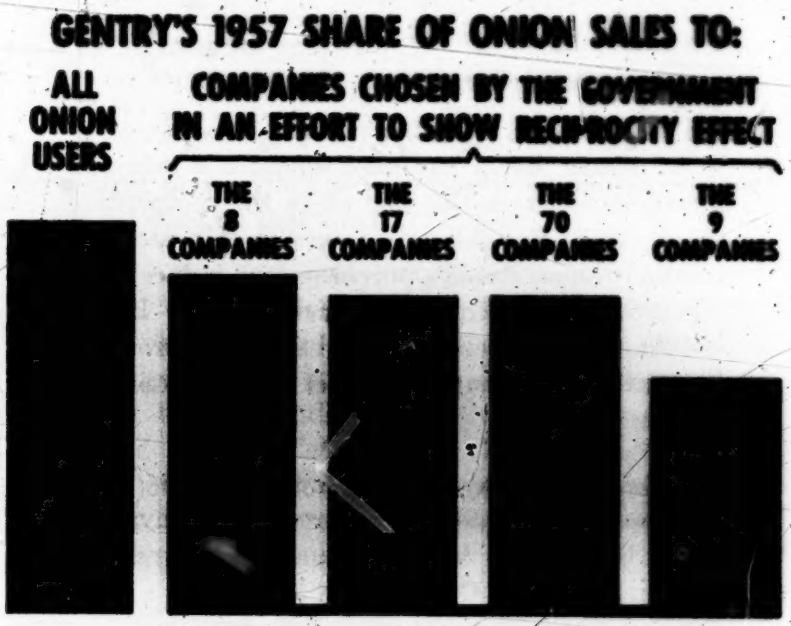
that Consolidated's purchases will have any greater effect in the future than they have had in eight years.

We shall mention at this point only two salient facets of the record. First, although dehydrated onion and garlic are both made the same way, marketed the same way and used the same way by the same customers, Gentry's garlic market share decreased by 12% from 1950 to 1958, while its onion market share increased by 7%. If both "overt" and "tacit accommodative reciprocity" were as effective as the Government contends, Gentry's market shares of both onion and garlic would have increased substantially after 1951. And it is noteworthy that Gentry's onion market share did not really increase until after 1955, when it achieved leadership in onion quality through a dramatic processing improvement.

Turning from the overall to the specific, conclusive proof of the noneffectiveness of Consolidated's alleged purchasing power lies in Gentry's actual experience with the groups of companies selected by the Government at various stages of the case in an attempt to show the existence and effectiveness of the alleged reciprocity power. Commission trial counsel introduced reciprocity evidence on 70 companies; the Hearing Examiner selected nine; Commission counsel before the Seventh Circuit picked out 17; and now the Solicitor General has chosen eight. All of these companies were suppliers to Consolidated; some were very substantial suppliers. Overt reciprocity attempts were utilized with most; all were continually subject since 1951 to the alleged "tacit accommodative reciprocity."

Did those companies buy from Gentry as a result of Consolidated's purchases from them? The evidence shows overwhelmingly that they did not.

The following chart shows that Gentry had less sales success by 1957, six full years after the merger, with each group of the alleged reciprocity-affected customers than it had with all onion users[4]:


GENTRY'S 1957 SHARE OF ONION SALES TO:
ALL ONION USERS
COMPANIES CHOSEN BY THE GOVERNMENT IN AN EFFORT TO SHOW RECIPROCITY EFFECT
THE 8 COMPANIES
THE 17 COMPANIES
THE 70 COMPANIES
THE 9 COMPANIES

[4] 1957 is chosen because it is the last year for which the most complete data on sales to the companies by Gentry's competitors is available in the record. Actually, the percentage of sales made by Gentry to three of the four groups of companies is overstated since as to some of the companies the record does not contain data on sales by Gentry's competitors. Data and record citations are shown in the table at pages 124-127 of the Reciprocity Supplement.

The False Issues Raised by the Government

There are several issues argued by the Government which are not raised by this case.

Contention: Business reciprocity is necessarily and inherently anticompetitive. (Br. 8, 15)

Comment: Read literally, the word "reciprocity" itself means that a purchase obtained a sale and therefore assumes the answer to the competitive effect issue. But the only issues in this case are whether Consolidated's purchases can induce sales (therefore producing reciprocity) and, if so, whether the reciprocity-induced sales will probably be substantial enough to affect competition in a Section 7 context.

Contention: The dehydrated onion and garlic market is tailor-made for the exploitation of reciprocal buying power because it is made up of a few small nondiversified companies competing with Gentry. (Br. 30)

Comment: It matters not how few or how small and nondiversified Gentry's competitors are if Consolidated's alleged reciprocity power does not exist and cannot be exploited among food processors who are the customers of the dehydrated onion and garlic producers. That is the market on which the first inquiry in this case must be focused.

Contention: Post-acquisition merger effect evidence should not be considered in Section 7 cases. (Br. 47-48)

Comment: There is no occasion for the Court to decide whether and to what extent post-acquisition

evidence is relevant in the ordinary horizontal or vertical merger case on the issue of merger effect. The post-acquisition evidence here is relevant in deciding whether Consolidated's purchases from food processors get substantial sales for Gentry —in other words, on the issue of whether any power of consequence was created by the merger. There is no other way to measure the alleged power except in this record. Even the Government admits that certain post-acquisition evidence may be relevant on that issue. (Br. 49)

The mere fact that this evidence may not be available in other cases (Government or private treble-damage) does not mean that it should be disregarded when it is available. To hold otherwise would be to repudiate this Court's decision in *United States* v. *duPont & Co.*, 353 U.S. 586 (1957), where a 1917 stock acquisition was held bad at least in part on the basis of many years of post-acquisition experience.[5]

The Reciprocity Supplement

The Government and Consolidated introduced evidence relating to 97 companies on the reciprocity issue. We cannot in this brief analyze the evidence as to all of these companies, important though it is to the issues before the Court. We will of necessity, therefore, rest many of our

[5] There is one other issue hesitantly mentioned in the brief *amicus curiae*. This is the so-called "deep-pocket" or "rich parent" theory. (See Trabon Br. 12.) This theory was not argued before the Commission or the Seventh Circuit, was not considered in any of the decisions, is not argued by the Government, and is not included in the question presented by the Government.

arguments on examples. And to provide the Court with more detailed treatment of the evidence, should it desire to seek corroboration or to verify that the examples have been fairly chosen, we are filing a separate printed document referred to as the "Reciprocity Supplement." This document contains a detailed analysis of the evidence with respect to companies included in the reciprocity evidence.[6] It provides, we submit, the kind of case study or marketplace analysis that is essential to an evaluation of the past and future effectiveness of reciprocity; it is the only such case study that, to our knowledge, is available anywhere.

Since the Government has raised an issue relating to Gentry's quality competition, we have also included in the Reciprocity Supplement (pages 85-115) a summary of the evidence showing that Gentry's quality (as well as its price and service competition) was at least equal to that of its competitors. The Government's distortion of the evidence on this issue will be only briefly discussed in the argument. (See pages 19-22.)

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[6] An alphabetical list of all companies discussed appears at page 119 of the Reciprocity Supplement. Consolidated uses in this brief and the Reciprocity Supplement the same record citation system adopted by the Solicitor General (Br. 1), except that unprinted exhibits are shown by the omission of a record page citation. At page 129 of the Supplement is a table showing the record pages at which each exhibit cited was received in evidence.

ARGUMENT

I.

THE GOVERNMENT'S ARGUMENTS, LIKE THE COMMISSION'S, ARE BASED ON SPECULATION

We have already mentioned that the Government slips repeatedly into the use of the words "may," "might" and "possibility" in analyzing the alleged reciprocity potential created by this merger. In similar vein, the Government, in its search for some evidence in the record to support its conclusions, has seized upon speculative evidence which, at best, supports only the thesis of possibility of some effect rather than probability of substantial effect.

The Misleading Statistical Analyses Relied on by the Government

The Government urges, as the Commission stated, that the industry structure in this case is "tailor-made to the exploitation of reciprocal buying power." (Br. 30) Two statistical arguments are advanced in an effort to support that conclusion as well as the position that there is in this record evidence of probable substantial effect:

1. "Consolidated is a substantial purchaser of the products of food processors, having bought about $134 million worth in 1955. (CX 1, R. 1974)." (Br. 4; see also Br. 32)

2. "In 1950, the last full year before the merger, Gentry made about 65 percent of its 'major' sales (*i.e.*, 10,000 pounds or more a year) to food

> processors which supply Consolidated. • • • By 1958, however, after almost eight years of joint operation, the sales to Consolidated's suppliers had increased to approximately 71 percent of major sales, at a time when such firms comprised about 50 percent of the total market for dehydrated onion and garlic." (Br. 52)

The statistics used by the Government in making these two arguments are both inaccurate and wide of the mark. We shall discuss the arguments separately.

The Inaccurate $134,000,000 Figure

The figure of $134,000,000 does not represent either Consolidated's total purchases or its purchases from food processors. As the exhibit cited by the Government states, this is *sales* of all products by Consolidated's distribution units. (CX 1, R. 1974) There is no figure anywhere in this record showing Consolidated's total purchases.

Furthermore, it is not Consolidated's total purchases or even total purchases from food processors that can have any meaning in this case. First, many products are bought by Consolidated for resale through its retail supermarkets that are not food products (*e.g.*, cleaning materials, toothpaste, cigarettes). Second, many products are bought from food processors that do not contain any onion or garlic and therefore could generate no reciprocity for Gentry (*e.g.*, canned and frozen fruits, many canned and frozen vegetables and fresh meat).

The point is that the Government had the burden of proving the extent of Consolidated's alleged purchasing power; it should not be allowed to discharge that burden

by relying on statistics which on their face have nothing to do with the volume of Consolidated's purchases from suppliers that use onion and garlic.

But of considerably more importance is the fact that it is not total purchases from all suppliers but the volume of purchases from individual suppliers that has meaning in attempting to ascertain the sales-inducing leverage, if any, that is produced by purchases. Campbell Soup Company obviously will not be influenced by Consolidated's purchases from H. J. Heinz. And nowhere does the Government point to volume of purchases by Consolidated from individual suppliers. Actually, this volume represents in many instances a very small portion of the supplier's total sales, so that the alleged "leverage," even under the Government's theory, is thereby minimal.[7]

It is this factor which also renders meaningless the Government's thrice-repeated argument that probability of effect is proved because Consolidated's suppliers buy a large portion of Gentry's and the total domestic dehydrated onion and garlic supply. (Br. 13, 32-33, 52) This would be true of any supermarket; it will carry hundreds, if not thousands, of items bought from large food processors who in turn buy a large portion of all dehydrated onion and garlic. For example, American Home Foods and Thomas J. Lipton, Inc. bought over 3,000,000 pounds of dehydrated onion and garlic in 1958 alone. (RX 123, R. 2438; RX 146, R. 2447)

Most supermarkets carry Lipton's tea and American Home Foods' Chef Boy-Ar-Dee spaghetti. But even the Government would surely agree that if Gentry (without Consolidated) owned a supermarket, that supermarket's

[7] Consolidated's purchases and the suppliers' total sales are given in the Reciprocity Supplement for most of the companies involved in the reciprocity evidence.

purchases of a minute portion of Lipton's and American Home Foods' total sales of tea and spaghetti would hardly induce Lipton and American Home Foods to buy their large onion and garlic ingredient needs from Gentry. For this reason alone, the fact that Consolidated's suppliers buy a large portion of Gentry's (or all producers') onion and garlic means little on the effect issue. What counts even under the Government's theory is whether Consolidated's purchases from each of those suppliers will induce them to buy from Gentry.

Thus, both the $134,000,000 figure (or whatever lesser figure represents actual purchases from dehydrated onion and garlic users) and the figure showing the amount of onion and garlic bought by Consolidated's suppliers merely add up to the obvious—that there are a number of food suppliers who could be subjected to reciprocity power by Consolidated if any such power exists. At best, the figures demonstrate only the area of "reciprocity opportunity" or possible effect; neither helps one whit in determining whether Consolidated's purchases from its suppliers will in fact cause those suppliers to buy from Gentry.

The Fallacious Statistics Showing Increased Gentry Sales to Consolidated's Suppliers

The Government states that the percentage of Gentry's sales made to its major customers (purchasers of over 10,000 pounds of onion or garlic in any one year from 1946 to 1958) who were Consolidated's suppliers went up from 65% in 1950 to 71% in 1958, and argues that this demonstrates "that reciprocity was very much at work in promoting Gentry's sales." (Br. 52)

There are three fundamental defects in this argument:

1. The amount or percentage of Gentry's sales in 1950 or 1958 (or any other year) to its major customers who were Consolidated's suppliers in that year cannot be determined from this record.

2. There is no showing, even if there were an increase during the years 1950-1958, that the percent of total sales to these same suppliers by Gentry's competitors did not increase as much as Gentry's. This cannot be ascertained since the data is not in the record and without this data the Government's argument is meaningless.

3. It is inevitable that Gentry's sales to Consolidated's suppliers would have increased to some degree during the years 1950-1958; this would have occurred even if there had been no merger.

First, the Government misapprehends the contents of the exhibit on which it relied in making this percentage argument and in constructing the tables in the appendices to its brief. Respondent's Exhibit 191 (R. 2489) is the only exhibit identifying Gentry's major customers who were suppliers to Consolidated. But the suppliers are expressly defined as those who sold anything to Consolidated in *any* one of the years from 1950 to 1958. For example, the tabulation of Gentry's sales to Consolidated's suppliers could include, in the year 1958, sales to companies which were Consolidated's suppliers in 1950 but not in 1958. An additional complication results from the fact that Gentry's major customers are defined as those who bought over 10,000 pounds of onion or garlic in *any* year from 1946 to 1958. These definitions make it impossible to compute for any single year Gentry's sales to its major customers who

were Consolidated's suppliers in that year. The definitions also destroy the statistical basis for the Government's argument that at the time of the merger Consolidated's suppliers were buying from Gentry at least 25% of total dehydrated onion and garlic production. (Br. 13)

Even if we assume that the portion of Gentry's total sales that were made to Consolidated's suppliers increased to some unknown degree after 1950, the same is undoubtedly true for Gentry's competitors since all producers increased their sales to food processors during those years. And if Gentry's competitors increased their sales to Consolidated's suppliers as much as Gentry did, the Government's statistical argument does not support its conclusion.

Many big food companies vastly increased their usage of dehydrated onion and garlic from 1950 to 1958. There was, commencing in 1950, a remarkable growth in public consumption of foods containing dehydrated onion and garlic, such as Italian foods, barbecue seasonings, dried soups, salad dressings and many new convenience foods. (R. 209, 1138, 1425-1426) During the same period, Consolidated expanded its wholesale and retail operations. (R. 130-131, 378-668; RX 395, R. 2662) Naturally, therefore, Consolidated purchased from many more food suppliers over these years—and these food suppliers were the very ones that were, for the reasons stated above, substantially increasing their usage of dehydrated onion and garlic. They bought larger amounts from all producers and, while the complete data is not available in the record, there is every reason to believe that Gentry's competitors shared in this business as much as Gentry. We do have the data for a number of very large users and it is significant that at each of the following companies, to choose just a few (all Consolidated's suppliers), Gentry's competitors increased their sales in the years 1950 to 1958 more than

Gentry did: McCormick & Co., Armour & Company, Grocery Store Products Company, George A. Hormel & Co., Oscar Mayer & Company, J. L. Read Foods, Inc.[8]

Thus, neither an increase in number of food processors selling to Consolidated nor a concomitant increase in Gentry's sales to those food suppliers can be used (without any causal connection between the two figures and without any data showing lesser sales success by Gentry's competitors to the same suppliers) to prove, as the Government argues, that "reciprocity was very much at work." (Br. 52) All this does, again, is measure an area of "reciprocity opportunity" and proves nothing at all as to the actual existence of reciprocal buying.

This use of market statistics that resulted from happenings entirely unrelated to the Consolidated-Gentry merger is a perfect example of the type of speculation which the Government has continually used and which should not control the outcome of this case. It is something like reasoning that the increase in total cigarette sales from 1900 to 1964, by itself and ignoring the population growth, proves that every person smokes more.

The Danger of Using a Reciprocity Contact as Proof of Reciprocal Buying

Another example of reliance on speculative evidence is the Government's emphasis on proof showing reciprocity contacts by Consolidated. (Br. 36-38) Commission trial counsel, the Commission itself and now the Solicitor General reason from the fact of a reciprocity contact to the conclusion of reciprocal buying. But one does not establish the existence of the other.

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[8] See Reciprocity Supplement for data as to each of these companies and many others.

Buyers may select their supplier for reasons entirely unrelated to reciprocity and then, to curry good will with a customer, the sales department may say to the customer that the decision was made for reasons of reciprocity. To avoid creating ill will with competitors of the favored supplier who may be some day needed as a source of supply, the buyer may intimate falsely to the competitor that reciprocity was a factor in his decision.

Good examples of this are Armour & Company and Oscar Mayer & Company, cited by the Government as examples of reciprocity effectiveness. (Br. 37-38) The Government quotes politic letters from these companies to Consolidated expressing a desire to do business with Gentry because Consolidated is a customer. But the record shows that both of these companies continued to buy most of their requirements from Gentry's competitors and witnesses from these companies (who did all the onion and garlic buying during the years in question) testified that Gentry got no business whatsoever as a result of the contacts. (See Reciprocity Supplement, pages 9, 44.)

Another example is Grocery Store Products Company, where the Government introduced 33 exhibits showing repeated written and oral reciprocity contacts by Consolidated over a period of years. (CX 10-11, R. 1998-2001; CX 14-16, R. 2006-2010; CX 35-62, R. 2031-2063) Consolidated's purchases from this company ran about $50,000 to $100,000 per year and had steadily increased since 1950. (R. 785-786)

Gentry did make one sale (10,000 pounds of onion) to Grocery Store Products in 1955. But even if it be assumed that this sale resulted from the contacts—and the direct evidence is to the contrary, as we shall show—the effect was neither enduring nor substantial. The 10,000-pound order was placed in 1955; prior to that time Gentry had not received and thereafter Gentry did not receive, any business whatsoever from Grocery Store Products, except for

a 100-pound sample order in 1954. (RX 130, R. 2444) From 1951 to 1958 Basic (Basic Vegetable Products, Inc., Gentry's competitor) sold Grocery Store Products an average of 50,000 pounds per year or a total of about 400,000 pounds of dehydrated onion. (R. 787) This, we submit, is dramatic evidence of the fallacy inherent in relying upon a reciprocity contact as proof of reciprocity effect.

But let us turn to the remaining evidence. Consolidated called John Ross, President of Grocery Store Products, who had full knowledge of the Consolidated contacts and the purchase from Gentry; indeed, he personally instructed his purchasing agent to make the 10,000-pound purchase from Gentry. Mr. Ross testified that 100 pounds were bought from Gentry in 1954 for testing purposes, the Gentry salesman having demonstrated that the cheaper onion chips rather than sliced onion could be used in Kitchen Bouquet, one of the company's leading products. (R. 788-790)

This testimony is corroborated by contemporaneous sales reports of both Gentry and Basic. (CX 56, R. 2055; RX 53, R. 2366) Thereafter, Ross told his purchasing agent to give Gentry an "appreciation order." Thus, Gentry's service and price were the reasons for the purchase of 10,000 pounds in 1955—and there was no other reason. Ross testified flatly that the Consolidated contacts on Gentry's behalf had no effect on purchases. (R. 788-792)

Grocery Store Products is simply one example; the record is replete with many others, as we shall show in other contexts, proving that reciprocity "talk" cannot be relied on to show reciprocity effect.

The Government's Unsupportable Quality-Price Argument

The Government argues that Gentry's "product inferiority" coupled with the fact that "Basic has sold at the

same price," indicate that Gentry might have done even worse in this market absent its relationship with Consolidated, so that the market share evidence is meaningless. (Br. 49-51)

The Hearing Examiner, who heard the evidence, did not accept that argument. Aware and wary of the evidence, all the Hearing Examiner found was that in "some instances" objections were raised as to Gentry's quality. (R. 37-38) No finding was made by either the Hearing Examiner or the Commission that, as the Government argues, Basic sold "at the same price" as Gentry. (Br. 51)

This matter was exhaustively argued before the Seventh Circuit, which found that after the merger, Gentry "improved its onion processing equipment to eliminate a problem arising from the presence of wood splinters and achieved a product of higher quality than that of its competitors." (R. 2693) The Government errs in saying that the court "thus improperly rejected the Commission's finding." (Br. 51) The Commission made no finding on this point.

The Government tells a half-truth in making this statement: "After Gentry improved the [dehydration] process, Basic also stopped using wooden dehydration equipment so that the processing method used by both eliminated the wood splinters." (Br. 51) Basic did stop—but only on a part of its production. (R. 682) Basic's president admitted on cross-examination that Basic still had the wood splinter problem in 1960. (R. 1113) All Basic did at about the same time that Gentry switched to metal continuous conveyor dehydration equipment in 1954-1955 was to start using plastic trays for some of its production. (R. 681-682) Thus, Gentry had a clear quality edge over Basic from 1955 to 1958—and it was only in those years that Gentry managed to increase its onion market share.[9]

[9] The evidence on this point is summarized in the Reciprocity Supplement, commencing at page 85.

The testimony of Gentry's president cited by the Government on this issue is wide of the mark. The carefully selected portion of the testimony includes only Dr. Prater's statement that Basic was "the leader in the processing improvements and innovations." (Br. 50) But the context of the testimony was this: Dr. Prater testified that over the years each of the producers had made processing improvements and innovations; that Basic was the leader in the sense of making more of these improvements and innovations, but that the improvements and innovations "have been shared by all the domestic dehydrators." (R. 1443-1444)

In testimony not quoted by the Government, Dr. Prater went on to say that Gentry was able to increase its sales since 1950 because of "service, quality and price" (R. 1446-1447), that Gentry led the industry in eliminating the wood splinter problem in 1954 (R. 1444; see also R. 681), and that the results of Gentry's better quality were particularly apparent in the years 1956 to 1958 (R. 1448).

Actually, in terms of overall competition, it is not just quality but also price and service that gain sales. A customer will consider all three factors in deciding where to buy—and one factor may be more important to him than the others. Thus, a quality preference for Basic over Gentry (even if proved for all years, which it was not) does not mean that Gentry managed to maintain its market position through reciprocity. (Br. 51) The Government's argument to this effect leaves out essential facts. To reach the conclusion from the premise, even as a matter of theory, the Government would also have to show that Gentry was no better than Basic in price and service. An argument on this is attempted with respect to price, but it finds thin support in the record; the citations are to only a few selected instances where this was true. (Br. 51) There are many

instances where Gentry undersold Basic—and even Basic's sales manager testified that Basic had difficulty in meeting Gentry's price competition. (R. 312-313)

The Government does not even mention service competition. The reason is clear—the record shows overwhelmingly that Gentry far outdid Basic in this area of competition. Dr. Prater testified to this without contradiction (R. 1447, 1502) and Basic's sales manager complained about Gentry's superior service competition. (R. 344)

The users of dehydrated onion and garlic (the best judges) testified repeatedly that Gentry's quality was equal or superior to Basic's and that Gentry's price and service were frequently better and at least equal.

All of this evidence[10] contradicts the Government's argument that in the years 1951-1958 reciprocity overcame Gentry's inferior competition. This argument cannot be used to erase the clear picture painted by the market share data—that Consolidated's purchases were proved by actual experience not to be a sales-inducing power of any consequence.

Summary of the Government's Speculative Arguments

The foregoing discussion demonstrates that in this Court, as it has throughout this case, the Government has relied on speculative evidence and arguments. Not one witness

[10] We have collected in the Reciprocity Supplement (pages 89-115) the significant evidence (testimony and documents) which shows overwhelmingly why it cannot be found on this record that Gentry consistently offered inferior price, service or quality competition.

was called by the Commission to testify that his company bought from Gentry because of reciprocity. There is no reliable statistical evidence showing that Gentry enjoyed any sales success after 1951 because it was a part of Consolidated.

Indeed, we submit that the inability of the Government to cite any real evidence showing that Consolidated's purchases did or could get any sales of consequence for Gentry itself demonstrates that on this record it simply cannot be maintained that the Section 7 test of "probability of substantial effect" has been met.

II.

THE RECORD OVERWHELMINGLY DEMONSTRATES THE LACK OF ANY RECIPROCITY POWER

We have shown that the Government has consistently relied on assumption based on speculation in arguing the crucial question in this case—whether Consolidated's purchases will probably buy substantial sales for Gentry. But even if it be argued that an assumption of reciprocity effectiveness is enough to create a *prima facie* case, the record shows overwhelmingly that Consolidated's purchases did not and could not produce any substantial sales for Gentry. The Commission should not be permitted to simply ignore the record and resort to a "crystal ball" approach.

Both of the Alleged Types of Reciprocity Can Be Tested in the Record

This record provides an excellent testing ground for both of the Government's alleged types of reciprocity—"overt," which depends on pressure or persuasion, and "tacit accommodative," which supposedly operates through silent inducement. (Br. 10-11, 15, 20)

"Overt Reciprocity"

Taking "overt reciprocity" first, the record is replete with examples of all kinds of vocal and written persuasion and pressure. Commission trial counsel introduced almost 200

documents involving a total of 70 companies showing that over a period of years Consolidated used both a hard-sell and soft-sell approach in attempting to capitalize on its purchases from companies that could buy from Gentry. (CX 6-97, R. 1990-2109; CX 121-218, R. 2162-2304)

Indeed, we agree with the Government that "Consolidated attempted to coerce or induce reciprocal buying by its suppliers who were potential customers of Gentry." (Br. 7)

Consolidated's executives and salesmen did attempt to use reciprocity and learned the hard way that it was simply not effective. To use this record—as the Government has—to prove that reciprocity was repeatedly attempted and then refuse to examine the record to see whether it produced any results (and if not, why not) is completely illogical.

"Tacit Accommodative Reciprocity"

But putting to one side "overt reciprocity," the Government would have the Court believe that there is an insidious power known as "tacit accommodative reciprocity." It is argued that the supplier will automatically and "unilaterally" (Br. 24) buy from his customer because of the "'predilection of businessmen for an easy sale and the propensity to show gratitude to those who have favored a seller with orders.'"[11] (Br. 20) This type of reciprocity

[11] The Commission put it thusly: "It seems clear that merely as a result of its connection with Consolidated, and without any action on the latter's part, Gentry would have an unfair advantage over competitors enabling it to make sales that otherwise might not have been made." (R. 66-67) We note in passing the Commission's symptomatic use of the word "might."

allegedly poses a "threat to free competition * * * as great as the threat presented * * * by hints, threats or promises." (Br. 21)

The Government argues that Consolidated's suppliers comprise a very large percentage of the buyers of dehydrated onion and garlic. (Br. 52) One would expect, then, that the advocate of the "tacit accommodative reciprocity" theory would be able to prove quite readily from the record that the many food suppliers who would like to sell to Consolidated did flock to Gentry to buy their needs of dehydrated onion and garlic. Since "tacit accommodative reciprocity" has been existing constantly since 1951, is "practiced" by the customer-supplier, not Consolidated, and does not depend on vocalized threats or inducements, it cannot be argued that irresolution or fear of antitrust prosecution deterred its effect on these suppliers.

But the market share evidence and the company-by-company evidence show that "tacit accommodative reciprocity" has not had any effect of consequence overall or with important suppliers of Consolidated taken individually. Neither the Commission nor the Government has paused to ask whether these incontrovertible facts require that their assumption be re-examined. Disregarding proven experience, the Commission drove straight ahead:

> "The evidence may show that respondent has not thus far severely impaired competition in the industry by reciprocity but it does not show that respondent may not do so when it chooses or that it will not so choose in the future." (R. 71)

But the Commission and the Government cannot have the

cake and eat it, too. They cannot argue that "tacit accommodative reciprocity" (which does not depend on any action by Consolidated) is a market power having "probability of substantial effect" consequences, and then

> . . . ignore the fact that if this is so, it has been operating since 1951;
>
> . . . ignore the fact that the record shows overwhelmingly that no effect of any consequence has occurred since 1951; and
>
> . . . then attempt to wish away this evidence by saying, as the Commission did, that reciprocity will "probably" become substantially effective when Consolidated "chooses" to exercise its "reciprocity power." (R. 71)

The Market Share Data Shows That There Was No Reciprocity Power

The Government seeks to brush aside the post-acquisition market share data on the ground that Section 7 focuses on the future rather than the past. This is quite obviously true, but the argument misconceives the thrust of the market share evidence.

As even the Government is forced to concede, "there are, of course, permissible areas for post-acquisition evidence." (Br. 48) One of those areas must be where the key question is whether or not an effective market power was created by the merger—where it can be shown (as it has been here) that exercise of the alleged power has been attempted and

where the record demonstrates whether or not it was proved to be effective.[12]

As the Seventh Circuit recognized, the true significance of the market share evidence lies in its proof of the nonexistence of the alleged purchasing power. Since Consolidated did repeatedly attempt to exercise "overt reciprocity" for years after the acquisition, and since the alleged "tacit accommodative reciprocity" supposedly operates without anything being done by Consolidated, it is entirely appropriate to examine the trend of market shares to see if Gentry was benefited by the alleged power. That is all the more appropriate since the Government and the Commission have strongly urged that this market is "tailor-made to the exploitation of reciprocal buying power." (Br. 30)

The market share data with respect to the four companies that sold dehydrated onion and garlic in the years 1948-1958 is shown in the following chart and table:[13]

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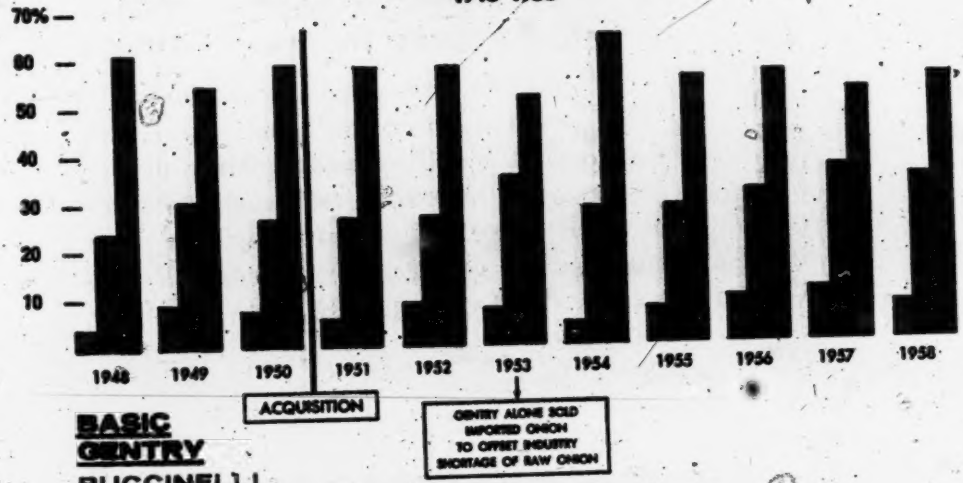
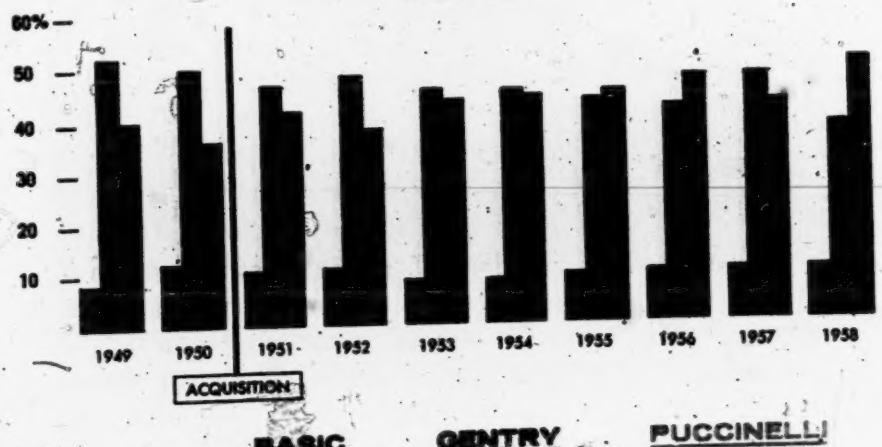
[12] A good example of such a case is *United States* v. *duPont & Co.*, 353 U.S. 586 (1957), where this Court carefully examined the record to ascertain whether duPont's stock interest in General Motors enabled duPont to supply General Motors' needs of automotive finishes and fabrics.

[13] Data is taken from RX 170, 171, R. 2476-2477. Simplot did not sell garlic and stopped selling onion in 1955; Gilroy Foods, General Foods and McCormick & Co. were new entrants after 1958. (R. 1224, 1912, 1917, 1971) Simplot's market shares (included in the table) have been omitted from the chart for purposes of simplification. The record shows clearly that Simplot's departure from the market was entirely unrelated to competitive conditions in the market (R. 273, 1273-1274), as the Commission itself recognized. (R. 73)

ONION MARKET SHARES
1948-1958



GARLIC MARKET SHARES
1949-1958



Dehydrated Onion Market Shares

Year	Basic	Gentry	Puccinelli	Simplot
1948	62%	24%	3%	11%
1949	55	31	9	5
1950	60	28	7	5
1951	59	27	5	9
1952	59	27	8	6
1953	52	36	7	5
1954	66	29	4	1
1955	57	29	8	6
1956	58	33	9	—
1957	52	38	10	—
1958	57	35	8	—

Dehydrated Garlic Market Shares

Year	Basic	Gentry	Puccinelli
1948	No Data	No Data	No Data
1949	39%	53%	8%
1950	36	51	13
1951	41	48	11
1952	38	50	12
1953	44	47	9
1954	45	46	9
1955	46	44	10
1956	47	43	10
1957	42	47	11
1958	50	39	11

The outstanding fact shown by the market share data is that Basic has remained the dominant onion producer and has, since 1950, taken the industry lead away from Gentry in the sale of dehydrated garlic. In 1950, Basic had 36% of the garlic market; in 1958, it had 50%. During this same period Gentry's share dropped from 51% to 39%.

In onion share, Basic has declined only slightly. Its average market share in the three years before the merger

(1948-1950) was 59%; in the period 1951 to 1958 its average share was 57.5% (the high was 66% in 1954). In 1958 Basic's share was 57%, and it was still by far the dominant producer (Gentry had only 35% in 1958).

The record demonstrates that there are virtually no differences between the production and sale of dehydrated onion and dehydrated garlic. With few exceptions, they are made the same way, marketed the same way and used the same way by the same customers. (See R. 1138-1139, 2559-2560 and company discussions in the Reciprocity Supplement.) If Consolidated's purchases obtained business for Gentry on dehydrated onion, it would surely have done so on dehydrated garlic. It is most significant, therefore, that in the face of the alleged "tacit accommodative reciprocity" power that the Government states has been operating since 1951, Gentry's share of the dehydrated garlic market dropped from 51% in 1950 to 39% in 1958—a decrease of 12%. In view of this and the lack of significant decline in the substantial share of the dehydrated onion market sold by Gentry's competitors, it is clear that Consolidated's purchases have not created a protected market for Gentry.

Another salient fact which precludes any inference of the effectiveness of reciprocity based on onion market share data is that almost all of Gentry's increased share came after 1954[14] when it changed from wood to metal dehydration equipment, thereby solving the vexing wood splinter problem. As we have earlier discussed (pages 20-21), Basic lagged behind Gentry in solving this problem and dropped from 66% of the onion market in 1954 to 52% in 1957. The

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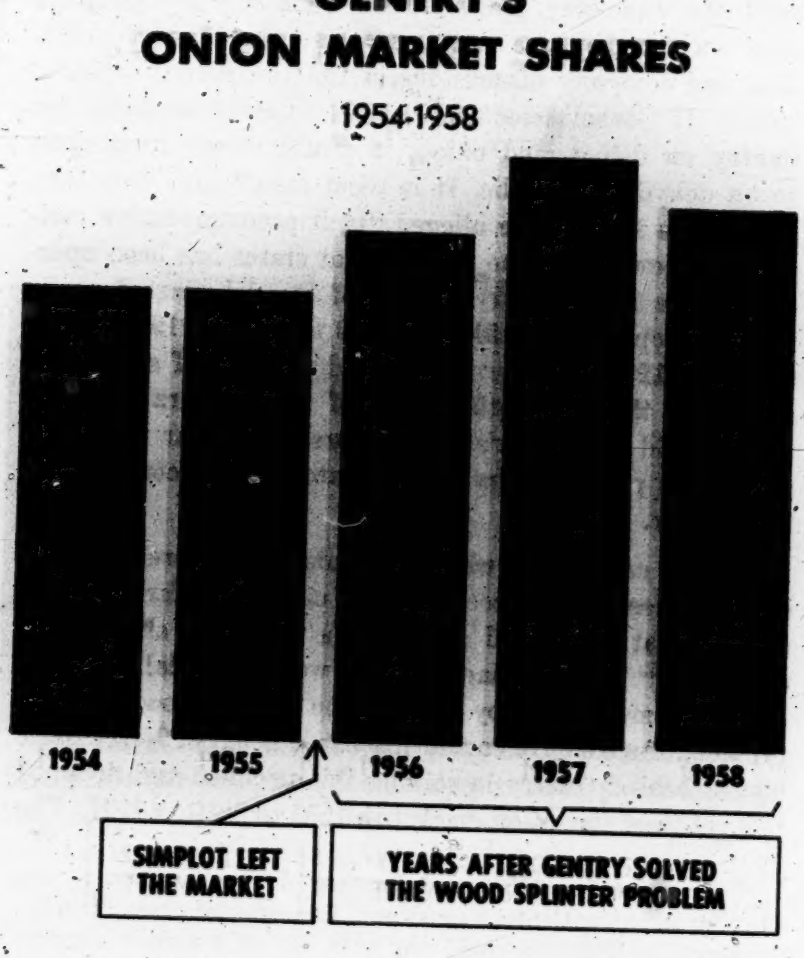
[14] The temporary 1953 onion increase obtained by Gentry was fully explained by Gentry's president. Domestic dehydrators underproduced in 1952 and could not meet the 1953 market demand. Gentry alone offset this by buying imported dehydrated onion. (R. 1448, 1532)

following chart shows graphically how Gentry's only real onion market share success came after 1955, after the remaining producers gained some benefit from the departure of Simplot from the market and after Gentry solved the wood splinter problem (Gentry's market share in 1954 was 29%, only 1% higher than in 1950):



That the improvement in the quality of Gentry's onion after 1955 led directly to substantially increased sales by Gentry to significant customers at Basic's expense is not just conjecture. There are a number of companies where the witnesses who did the buying testified that they gave business to Gentry instead of Basic after 1954 solely because of better Gentry quality resulting from the installation of metal dehydration equipment. Gentry's sales of onion to just three of these companies (Lipton, Snow and Beech-Nut) were over 1,000,000 pounds greater in 1957 than they were in 1954. (R. 676-677, 681, 700-701, 880-881; for data see RX 123, 124, 138; R. 2438, 2439, 2450) That 1,000,000-pound increase represents about 32% of Gentry's total 1954 sales, 15% of Gentry's total 1957 sales and about 6% of the total industry sales in 1957.

In evaluating the small increase (28% to 29%) in Gentry's onion market share after the acquisition and before its 1954 quality improvement, it is also significant that even prior to 1951 Gentry demonstrated an ability to increase its onion market share (up from 24% in 1948 to 31% in 1949 and to 28% in 1950).

While the market shares of Puccinelli, the smallest company, have fluctuated, its average for onion in the years 1948-1950 was 6.3%, and in the years 1955-1958 it was 8.8%. Its garlic share averaged a little less than 11% in 1948-1950 as well as in 1955-1958. Thus, Puccinelli's share of the domestic dehydrated onion market has increased in the period 1948-1958, and its share of the dehydrated garlic market has remained relatively constant.[15] Again, if reciprocity were operating in this market, the smallest company

[15] The decline in Puccinelli's market share of dehydrated onion in 1953-1954 was due to a plant fire which stopped production. (R. 1657, 1679-1680)

would surely feel the effect first, but Puccinelli increased its onion market share and held its own in garlic in the years 1950-1958.

The Government attempts to brush aside the garlic market share evidence with this argument:

> "The volume of [Gentry's] sales of onion and garlic more than doubled after the merger during years in which the industry experienced rapid growth. In the context of increasing sales, a decline in Gentry's share of the garlic market is not convincing refutation of the evidence that reciprocity was effective." (Br. 49; we note that the Government does not identify the "evidence that reciprocity was effective.")

Perhaps the decline is "not convincing refutation" to the Government because it refuses to acknowledge that, while Gentry more than doubled its sales of dehydrated onion and garlic in the years 1950 to 1958, its competitor, Basic, tripled its sales (see RX 170-171, R. 2476-2477):

Sales of Onion and Garlic

Year	Basic	Gentry
1950	4,345,419 lbs.	3,080,953 lbs.
1958	12,995,985	8,229,005
Increase	8,650,566	5,148,052

The Government never does explain how a decline in Gentry's garlic market share (in percentage) can be offset by an increase in Gentry's sales (in pounds) of onion and garlic, particularly when Gentry's chief onion competitor, in the face of the supposedly significant power, was able to increase its overall sales more and at a greater rate than Gentry.

We stress again that it is probability of substantial effect

that is the Section 7 test. To argue that Gentry's garlic share might have gone down further absent Consolidated's alleged purchasing power is to engage in pure speculation which squares not at all with a probability test.

Moreover, the market share data does not stand alone. As the Seventh Circuit recognized, the real significance of this data is that it confirms the other evidence in the case showing that Consolidated's purchases do not force or induce sales for Gentry. A good example is the sales trend with companies chosen by the Government at various stages of this case in an attempt to prove reciprocal buying. There have been four such groups—all 70 companies as to which reciprocity-attempt evidence was introduced, the nine companies relied on by the Hearing Examiner, the 17 companies selected by Commission counsel before the Seventh Circuit, and now the eight companies selected by the Government.

In 1957—six full years after the merger—Gentry's overall share of the onion market was 38%. But in that same year, Gentry sold 32% of the onion needs of all 70 companies, 32% of the companies argued to the Seventh Circuit, 33% of the Government's eight companies and only 23% of the Hearing Examiner's nine companies. (See chart at page 7.). In other words, Gentry did substantially worse in selling onion to each of these four groups of alleged reciprocity-affected customers than it did to all of its customers.

In summary, the evidence demonstrates that, despite vigorous attempts by Consolidated to practice "overt" reciprocal selling and the alleged existence of "tacit accommodative reciprocity" throughout the entire period:

1. Gentry's share of the garlic market dropped 12% after the merger.

2. Gentry's share of the onion market increased only 1% in the 1950-1955 period before it improved its quality, which compares with a 4% increase in 1948-1950 prior to the merger.

3. Gentry's increases in sales of both onion and garlic in the 1950-1958 period were substantially less than the increases of its major competitor.

4. Gentry's sales to any of the selected groups of alleged reciprocity-affected customers represented a smaller percentage of those customers' needs than did its sales to all customers.

In the face of that evidence it is impossible to find that the Consolidated-Gentry merger created a probability "that reciprocal buying power would foreclose a substantial part of the market." (Br. 2)

The Individual Company Evidence Proves Lack of Reciprocal Buying

We have analyzed in the Reciprocity Supplement the hearsay and circumstantial evidence as to each of the 70 companies which Commission counsel, by introducing documents and data, chose as his battleground for contesting the effectiveness of reciprocity. We have done this because that evidence goes to the heart of the case and because there is no other manageable way to draw from this very lengthy record the key evidence.

While the Commission did not call a single witness from any company to testify to reciprocity effect, Consolidated met the reciprocity issue head-on. In effect, it brought the marketplace to the courtroom. Over 60 witnesses who

actually had done the buying of dehydrated onion and garlic for 51 companies, accounting in the aggregate for over one-third of Gentry's 1958 sales, were called to testify as to why they had or had not bought from Gentry during the years since the acquisition.[16] As to the balance of the companies relied on by the Commission, Consolidated used documents and data to demonstrate that reciprocity did not operate.

Consolidated explored reciprocity with each of the witnesses who in each instance was the person who supervised or actually did the buying in all or most of the years since 1951. No effort was made to choose only witnesses who would deny reciprocity—Consolidated itself brought out on direct examination the many instances where reciprocity contacts were made and the three instances where they achieved some sales. (These three companies are discussed at pages 45-46.)

The Government's Selected Companies Do Not Support Its Argument

The Government has chosen from the record eight companies as instances of reciprocal sales. (Br. 37-43) Another 15 are referred to (but not named) as ones where Mr. Kennedy, Consolidated's President, said in 1951 that "he will do everything within his power to see that some of these tough nuts are cracked." (Br. 5-6; see CX 6, R. 1991; the 15 companies are listed in CX 7, R. 1992)

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[16] If we exclude from Gentry's total sales the purchases by its major customers that never sold anything to Consolidated, the percentage of witnesses' purchases to Gentry's sales to customers who did sell to Consolidated would be over 45%. (See Reciprocity Supplement, pages 3, 117-118.)

The Government's Unnamed 15

Six of the 15 "tough nuts" who were going to be "cracked" by Consolidated's alleged purchasing power never bought anything from Gentry.[17] Five more bought very little over the course of eight years, as the following table shows:

Company	Purchases from Gentry (in pounds) in All of the Seven Years From 1951 to 1958
H. C. Brill Co.	3,600
John H. Dulany & Son	1,654
Jones Chambliss Co.	1,460
Knickerbocker Mills Co.	34
Southern Biscuit Co.	200
	6,948

Thus, 11 of the 15 companies bought approximately 7,000 pounds in eight years, a period in which Gentry sold about 48 million pounds. (RX 170-171; R. 2476-2477)

At two other companies (Gibbs & Co. and Phillips Packing Co.), Gentry was spectacularly unsuccessful until they were acquired by Consolidated. (See Reciprocity Supplement, pages 28, 54.)

This leaves only two companies out of the 15—Beech-Nut Packing Co. and L. Pritchard, Inc. (a part of Hunt Foods & Industries, Inc.)—where Gentry had any real sales success. Consolidated called from each of those companies witnesses who had firsthand knowledge of the reasons for

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[17] Max Ams, Inc., Burry Biscuit Company, Heublein & Brothers, National Biscuit Co., Parrish Brothers, Smithfield, Ham & Products Co. See Reciprocity Supplement, pages 80-81, for data on those of the 15 companies that bought nothing or very little.

buying from Gentry during the years in question. They testified flatly that reciprocity had nothing to do with their purchases and explained the good reasons, based on price, quality and service, why they bought from Gentry. (See Reciprocity Supplement, pages 13, 34.)

The Government's Eight Named Companies

The Government argues that post-acquisition evidence as to eight companies shows that "reciprocal buying is a useful weapon" and that "Consolidated had success in some overt efforts to capitalize on its advantageous post-merger position." (Br. 37-43)

As we have been with every previous group of companies selected by the Government in an effort to show the existence of the alleged reciprocity power, we are content to rest on the record. Following are capsule statements of the evidence as to these companies; the full story is told in the Reciprocity Supplement.

American Home Foods. American Home Foods sold about $500,000 of its products to Consolidated in 1958. (R. 825-828) Evidence was introduced relating to four plants which purchased dehydrated onion and garlic—Oakland, California; Rochester, New York; Milton, Pennsylvania; and Morris Plains, New Jersey. (R. 830; RX 135, R. 2447)

Gentry has never sold anything to the Oakland plant, which has bought all of its substantial requirements (more that 250,000 pounds in 1957) from Basic. (R. 831; RX 135, R. 2447) Gentry's only sale to the Rochester plant was made in 1950—the year before the merger. (RX 135, R. 2447)

Since 1950, the year before the merger, the Milton plant has made substantial purchases from both Basic and Gen-

try. While purchases from Gentry have increased since 1950, Basic has continued to be the major supplier. (R. 846-847; RX 135, R. 2447)

John Romei, the Purchasing Agent at the Milton plant since 1945, was called as a witness by Consolidated to explain the reasons for his purchases. (R. 844) After Basic helped him convert from fresh to dehydrated onion in 1946, Romei purchased exclusively from Basic until 1950 because his volume did not warrant having a second supplier. However, with the commencement of the Korean War in 1950, Romei decided to have a second source of supply as insurance against wartime shortages. He selected Gentry (before it became a part of Consolidated) because his investigation disclosed that Gentry was the only supplier other than Basic able to supply a consistent quality product. (R. 846-848, 854, 856-857)

In 1951, although onion was scarce, Gentry was able to supply additional tonnage to meet Romei's increased needs —so Romei increased his purchases from Gentry. (R. 847, 849, 854) From 1954 on, the Milton plant's requirements have increased due to the dramatic sales growth of Italian foods (including the nationally advertised Chef Boy-Ar-Dee line). (R. 844, 847-849, 852) Romei awarded Basic roughly 60% and Gentry 40% of the business, in accordance with his policy of having one principal supplier and a good secondary source. (R. 849, 853-854, 856-858) He testified that the fact that Consolidated was a customer had no effect on his purchases. (R. 849)

Consolidated also called Frank Cooley from the Morris Plains plant to explain his purchases from Gentry, which have averaged less than 2500 pounds per year. (R. 965; RX 146, R. 2456) Cooley testified that in 1953 he decided to purchase from Gentry to have a second source of supply, in accord with his usual practice. (R. 967, 969) From 1953

to 1958, Basic continued to obtain the bulk of his business. (R. 971; RX 146, R. 2456) He testified that Consolidated's being a customer of American Home Foods had no effect on his purchasing decisions. (R. 967)

Frank M. Wilson Company, Inc. Wilson sells private label products to Consolidated; its 1958 sales were about $375,000. (R. 1157)

William G. Lester, Wilson's Purchasing Agent, testified that in 1954 he switched from Basic (his exclusive supplier from 1949 through 1953) to Gentry because Gentry offered a price advantage. Basic had been supplying its product in galvanized iron drums which required a deposit and which had to be returned. Gentry met Basic's price and offered to supply the product in a fibre drum which did not have to be returned so that Wilson saved the deposit. (R. 302, 1156, 1158-1161)

The advantages to Wilson arising from Gentry's method of supplying onion were corroborated and further elaborated in a call report written by a Basic salesman. (RX 100, R. 2413) The call report admits that by buying from Gentry, Wilson (1) saved the extra freight cost resulting from the heavier weight of Basic's drums, (2) did not have to incur costs in connection with the return of the empty drums, and (3) did not have money tied up in drum deposits. (RX 100, R. 2413) Wilson's purchasing agent testified that Basic had not been equal to Gentry in price, service and quality since 1954, and these were the only reasons why Wilson bought from Gentry. (R. 1163)

Although one Basic call report states that reciprocity was obtaining business for Gentry (CX 137, R. 2190), Lester testified that the fact that Consolidated was a customer had no effect on his purchases of onion and garlic from Gentry. (R. 1163)

Oscar Mayer & Company. Consolidated bought $500,000 of Oscar Mayer's products by 1958, but the record shows that even this, together with an overt reciprocity attempt, produced no sales success for Gentry. The reciprocity document relied on by the Government (RX 59, 2371; Br. 37) relates to a contact made at the Madison, Wisconsin plant of Oscar Mayer. (CX 213-217, R. 2299-2303) But Oscar Mayer at Madison bought from Gentry only 255 pounds of onion and no garlic in all the years from 1950 to 1958; during the same years, purchases from Basic averaged over 45,000 pounds per year and totaled 460,402 pounds. (RX 373, R. 2639)

The only Oscar Mayer plant outside of Madison that bought anything of consequence from Gentry was the one in Chicago. Consolidated called the purchasing agent from that plant and he testified that his one purchase from Gentry of 5,000 pounds of onion in 1955 resulted from business factors having nothing to do with reciprocity. (R. 1813-1814)

Consolidated also called P. Goff Beach, Jr., Executive Vice President, who, from 1950 to 1958, participated in the purchasing decisions at Oscar Mayer's central purchasing office. He testified that Oscar Mayer's sales to Consolidated had no effect on its purchases of onion and garlic. (R. 1553-1555, 1559-1561)

Armour & Company. Consolidated is an excellent customer of Armour, buying about $1,000,000 of its highly advertised meat products in 1958. Nevertheless, Armour has bought over 93% of its onion and garlic requirements in the years 1951 to 1958 from Gentry's competitors. In

1956 and 1957, Gentry's sales to Armour totaled 5,160 pounds, while its competitors' sales totaled 325,825 pounds. In 1958, Armour bought nothing from Gentry. (R. 1610; RX 381, R. 2642)

Commission counsel offered documents showing that Consolidated made repeated reciprocity contacts with Armour. (CX 135, R. 2183; CX 213, R. 2299-2301) Armour's purchasing agent, William Franklin, called as a witness by Consolidated, testified that a Consolidated executive asked Armour's president for reciprocal purchases from Gentry. Franklin furnished the information for the polite, but firm, reply which stated that Armour would not change its purchasing policies. (R. 1613-1615; RX 382-383, R. 2642-2645)

Gentry was Armour's second source of supply commencing in 1949—two years before the merger—but since 1955 Armour has purchased almost nothing from Gentry. Gentry was replaced as a second supplier by Puccinelli in 1956 because Puccinelli offered an acceptable product at an attractive price. (R. 1612-1613; RX 381, R. 2642)

Thus, the evidence shows clearly that neither overt nor silent reciprocity was effective to produce sales for Gentry. Franklin denied that he gave business to Gentry because of the reciprocity contacts. He further testified that none of his superiors ever asked or told him to give business to Gentry and that Consolidated's being an Armour customer had no effect on his purchases from Gentry. (R. 1613-1617)

J. L. Read Foods, Inc. Documents offered by Commission counsel stated that reciprocity contacts were made at Read. (CX 33, R. 2029; CX 183-185, R. 2256-2258) Consolidated called Thomas B. Bailey, Executive Vice President of Read, who participated in the decisions as to sources of

supply for onion and garlic. Bailey confirmed that reciprocity had been attempted, but stated that Consolidated's being a customer had no effect on the volume of Read's purchases from Gentry. (R. 1828, 1830-1833)

In fact, the evidence shows that the reciprocity attempts boomeranged against Gentry. In 1955, a Basic salesman reported that Read's purchasing agent, relying on a laboratory report recommending Gentry, purchased from Gentry in accordance with company policy to follow laboratory recommendations. (CX 184, R. 2257) However, the Basic salesman reported that Gentry's superior quality was countered by the president's (Jack Read) preference for purchasing from companies other than his customers:

> "Ed [a Read purchasing official] said that Jack [Read] is a very stubborn fellow & dislikes the attempts of Gentry to dictate. Actually he said Jack prefers to buy from sources other than ones who sell his merchandise as he feels he can then be freer to complain if things go wrong." (CX 184, R. 2257)

This evidence is supported by the data, which shows that although Gentry was Read's exclusive supplier before the merger, Basic obtained much more business at Read after the merger than did Gentry. (RX 414, R. 2680) Bailey explained that Read continued to purchase from Gentry, its original supplier, in order to have two sources of supply. (R. 1831)

The inability of Consolidated's purchases to get sales for Gentry is demonstrated by the lack of any relationship between Read's sales to Consolidated and Read's purchases from Gentry. Although Read's sales to Consolidated increased from $400,000 in 1951 to a peak of $600,000 in 1953, 1953 was the year in which Read began purchasing from

Basic. Its purchases from Basic thereafter increased substantially. Then, in 1954 and subsequent years, Gentry's sales to Read increased while Read's sales to Consolidated decreased substantially. (R. 1829-1830, 1835; RX 414, R. 2680)

The Three Companies Where Effect Was Admitted

The Government has cited the only three companies out of the 51 from which witnesses were called where reciprocity effect was admitted.[18] (Br. 41) The witnesses from these three companies (Illinois Meat Company, J. J. Gielow & Sons, Inc. and Woolson Spice Company) were called by Consolidated, and the fact of reciprocity effect was brought out on direct examination as a part of Consolidated's trial case of showing what happened with respect to all companies named in the Commission's reciprocity evidence. The aim, achieved, was to show that while Consolidated's purchases may gain some sales from a few companies, its overall impact is inconsequential. Why should the evidence

[18] The Government is in error in stating (Br. 42) that Consolidated has admitted that "reciprocity coerced purchases" at one of these companies (J. J. Gielow & Sons, Inc.). Another error (undoubtedly typographical) is the statement on the same page that Consolidated conceded in its Reciprocity Supplement filed with the Seventh Circuit that Gielow gave its onion and garlic business to Gentry "because of a reciprocity *contract*." (Br. 42; emphasis added) The word used was "contact." Neither coercion nor a contract was proved at Gielow; friendly reciprocity got some business for Gentry from this unusual supplier who testified that he did not particularly care where he bought his onion and garlic because it was used in his pickles only for appearance, not flavor. (See Reciprocity Supplement, page 28.)

as to these three companies be accepted and the evidence of noneffectiveness given by the witnesses from the other 48 companies be rejected?

Further, one of these three companies demonstrates the fleeting effect of reciprocity even in the rare instances where it existed. At Illinois Meat Company, Consolidated brought out from its own witness that an official of Consolidated, who was a close family friend of Mr. Brickman (the witness, who did the buying for Illinois Meat) called Brickman in 1951 to ask if he would buy from Gentry. Brickman did so because of the personal relationship and also because Consolidated was a good customer. (R. 1818-1819)

But the story doesn't end there. From 1951 to 1954 Brickman did give most of his business (30,030 pounds over the four-year period) to Gentry, but in 1955 he switched to other suppliers for ordinary competitive reasons. From 1955 to 1958 (during a period when Illinois Meat's sales to Consolidated were increasing), he bought only 170 pounds of onion and garlic from Gentry as opposed to 54,600 pounds from Gentry's competitors. (R. 1817; RX 409, R. 2679)

The loss of this customer by Gentry demonstrates that Consolidated's purchases do not create a "protected market" for Gentry.

Summary as to the Eight Companies

The real importance of the evidence relating to these eight companies is that it illustrates the many real reasons why Consolidated's purchases do not and cannot produce substantial sales for Gentry.

Two of the five companies where reciprocity did not operate (J. L. Read Foods and Frank M. Wilson) sold private label products to Consolidated, while the other three sold nationally advertised products. Not one of these purchased dehydrated onion and garlic from Gentry because Consolidated was a customer. "Tacit accommodative reciprocity" was nonexistent.

Furthermore, overt reciprocity contacts were made at three of these companies, J. L. Read, Armour and American Home Foods. While Read does market products under its own labels, most of its sales to Consolidated were under Consolidated's private labels. Nevertheless, Read preferred not to buy from its customer because for good business reasons it wanted to preserve independence to buy on the basis of price, service and quality.

When Consolidated pointed out to Armour that its products were being sold in Consolidated's stores, Armour politely acknowledged this, but firmly refused to buy from Gentry. In 1953, the year when Armour's president and a Consolidated executive exchanged letters, Gentry sold to Armour less than one-fifth the amount of onion and garlic it had sold in 1951. And, in 1958, Gentry sold nothing to Armour, yet Armour sold $1,000,000 of its products to Consolidated—what better proof could there be of the ability of a company selling a product for which there is consumer demand to resist a reciprocity attempt? Armour is also an excellent example of the necessity of food processors selling highly competitive products to reject reciprocity in favor of obtaining the benefits of price, service and quality competition in making their ingredient purchases.

The Government argues (Br. 38) that the evidence regarding these companies "amply supports" the Commission's conclusion that the merger "conferred upon [Consoli-

dated] the power to foreclose competition from a substantial share of the markets for dehydrated onion and garlic." (Br. 43) There is simply no support in the record for that argument. The eight-company evidence is dramatic proof, again, that the Government's conclusions are sheer speculation. They are not only not supported by the record but are directly contradicted by it.

It was this type of evidence (including the data showing Gentry's lack of sales success) that we suggest convinced the Commission that it could not rely on the nine companies selected by the Hearing Examiner to show the successful practice of reciprocity.[19] The data as to the Solicitor General's eight companies shows the same picture that it did with respect to the Hearing Examiner's nine—in 1957, six years after the merger (the last year for which most complete data is available on sales by Gentry's competitors) Gentry's competitors did spectacularly better in selling onion and garlic to these allegedly reciprocity-affected companies than Gentry did, as the following chart shows:[20]

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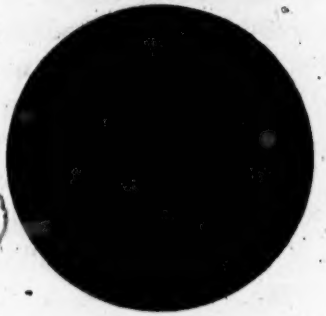
[19] The Government states (Br. 31) that the Commission "did not pass" on the correctness of the Hearing Examiner's findings as to these companies.

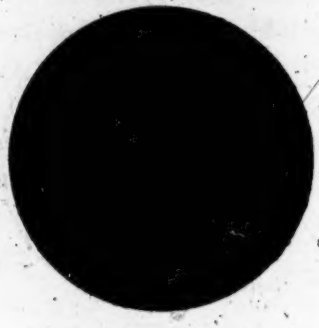
[20] The data for each company appears in the table at page 128 of the Reciprocity Supplement.

ONION AND GARLIC SALES IN 1957

TO THE HEARING EXAMINER'S NINE COMPANIES



TO THE SOLICITOR GENERAL'S EIGHT COMPANIES



Summary of the Reciprocity Evidence

The Government says this:

> "Similarly, evidence establishing that reciprocal buying was, in fact, impossible in the relevant industry would be material and admissible. But this proof should not be made to turn on a recitation of individual post-acquisition failures. The probative value of the particular unsuccessful attempts is minimal since there is no ordinarily satisfactory method of determining the underlying cause of any single failure. In this case, the Commission properly did not pass on the particular instances when such attempts were allegedly successful or unsuccessful; the state of the record demonstrates that the proof was, at best, equivocal with respect to the success of those endeavors." (Br. 49)

This most interesting statement concedes a salient fact—that the Commission did not pass on the many "particular instances" where Consolidated proved through direct evidence that reciprocity attempts were unsuccessful. This admission (which is also made at page 31 of the brief) establishes that the Commission completely ignored the evidence showing that Consolidated's purchases could not get any substantial business for Gentry, despite repeated overt attempts and despite years of "tacit accommodative reciprocity." The Government in making this statement is also waiving any argument that the Commission found the customer evidence to be lacking in credibility—it simply "did not pass" on it.

In other words, if this evidence is relevant on the power issue, it cannot be brushed aside on the ground that the fact-finding agency found it not credible. And if credible and relevant, it should control.[21]

The Government is simply wrong in stating that there is no "satisfactory method of determining" the causes of Gentry's failure to achieve sales success with the alleged reciprocity-affected companies. Under our judicial system, there is a method that is time-tested and, indeed, a central pillar of that system. That is to call as witnesses the men who actually made the decisions to buy or not to buy from Gentry and ask them under oath the basis on which they made their decisions. Consolidated did this—and 60 witnesses from 51 companies, representing a fair cross-section and sampling of Gentry's customers, testified that reciprocity had not worked and told why it would not work.

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[21] See *National Labor Relations Board* v. *Russell Mfg. Co.*, 191 F.2d 358, 360 (5th Cir. 1951); *National Labor Relations Board* v. *Ray Smith Transport Co.*, 193 F.2d 142, 146 (5th Cir. 1951).

To say that "the state of the record demonstrates that the proof was, at best, equivocal with respect to the success of [Consolidated's reciprocity] endeavors" is to say that unimpeached, uncontradicted testimony (corroborated by data and frequently by contemporaneous documents) is worth nothing in the judicial determination of a fact question.

Or to be more precise, the Government's statement can only mean (in view of the overwhelming evidence in this record that reciprocity did not work) that if one simply assumes that reciprocity works, that assumption cannot be overcome by evidence. This, indeed, was the net of the Commission's decision and we are confident that this Court will not adopt such a view—particularly where, as here, there is no source anywhere except in this record to test the assumption that simply because Consolidated buys from a company, that company will buy onion and garlic from Gentry.

III.

THE BUSINESS REASONS WHY PURCHASES DO NOT BUY SALES

We have shown in the foregoing section that this record negates the conclusion that Consolidated's purchases create a sales-inducing power for Gentry. There are many good business reasons for this. It is one thing to assume that the lawyer will patronize his client, the barber (although we note that for a variety of human reasons he may very well not do so). It is quite another thing to assume that purchasing agents for food processors will always or even frequently give purchasing preference to their company's customers.

The Importance of Industry Context in Assessing Reciprocity

The more that buyers must be controlled by price, service and quality, the less effective will be extraneous factors such as reciprocity. Among food processors, where profit margins are narrow and quality is a key factor, price, service and quality are all important. Even the Government is forced to admit that these factors are "significant in the food industry." (Br. 38)

With respect to the products involved in this case, rigid controls frequently exist to insure that color, flavor and presence of foreign materials do not adversely affect the final product. Ingredient specifications are established for the guidance of purchasing departments. Controls by laboratory tests and inspections check on whether ingredients meet the specifications. Such controls make it extremely difficult for reciprocity to affect purchasing decisions. (See, *e.g.*, R. 954-955, 1586-1594.) Also, when a buyer requires

ingredients tailored to its needs, it is forced to look to the supplier which can best satisfy that need, regardless of whether or not the supplier is also a customer.

The record shows that since onion and garlic obviously have pronounced odor and flavor characteristics, users want to have precisely the right type for use in their food products.

Examples: Wyler wanted Gentry's powdered onion and garlic because it had a more pungent odor (R. 1779-1780; RX 106, R. 2419); Fearn Foods needed Basic's larger size onion flakes (R. 1757); Milani Foods needed a type of onion that was produced only by Gentry (R. 1051); Standard Brands worked with Basic in developing a new onion soup base and used Basic's onion thereafter in the product (R. 975); Universal Foods bought large, toasted onion flakes from Gentry because other producers were not able to supply them (R. 1514-1515); Moore & Company needed a particular cut of onion which only Gentry supplied (R. 934); Frank M. Wilson used Basic's granulated products because they were better for Wilson's hot sauce and catsup than Gentry's powdered products (R. 1159-1160).

Consumer Demand Inhibits Reciprocal Buying

This record shows how little effect Consolidated's purchases have in the buying decisions of food processors having well-known products that must be carried by Consolidated's wholesale and retail distribution units to satisfy consumer demand. A good example is the Birds Eye Division of General Foods. Although Consolidated's purchases were $764,000 in 1958 (R. 822), Birds Eye bought only

sporadically and in very small amounts from Gentry. (RX 133, R. 2446) Consolidated's purchases from Oscar Mayer were $500,000 in 1958 (R. 1552), but Gentry's sales to this company have been extremely small. (RX 373, R. 2639) At Hormel, Consolidated's purchases were over $320,000 in 1957, but Gentry has sold them practically nothing. (R. 431, 458, 539, 604, 612-613; RX 154-157)

Before the Seventh Circuit, counsel for the Commission conceded that a company having consumer demand for its products could "resist Consolidated's pressure." (Resp. Br. 58) The Seventh Circuit recognized the reality of this reciprocity-inhibiting factor, stating that reciprocity had especially little effect "in the case of nationally known and advertised brands which through consumer acceptance and loyalty would be relatively immune from individual wholesaler or retailer dictation of the source from which ingredients must be obtained." (R. 2693)

The Government, nevertheless argues that Consolidated has the power to discontinue even nationally advertised brands. (Br. 45-46) This defies common sense and the record in this case. (See, *e.g.*, R. 447-448, 547-548, 828-829, 1048, 1365.) The Commission has itself acknowledged the power of a well-known brand name:

> "By reason of distinctive packaging, the firm's long history, mass advertising and sales promotions, or other factors, a firm may succeed in establishing such a definite preference for its brand that the consumer will pay a premium to obtain it, although it is functionally identical to competing brands." (*Procter & Gamble Co.*, CCH Trade Reg. Rep. ¶ 16,673 at 21,571 (1963))

Established nationally advertised brands are, in the Commission's words, "must" items for retailers. *Procter & Gamble Co.*, CCH Trade Reg. Rep. ¶ 16,673 at 21,578.

Well-known brands are especially important in the food industry. This is evidenced by the vast advertising expenditures of food processors seeking to establish their brands.[22] In the *Procter & Gamble* case, the Commission held that the power created by the demand for goods bearing an established brand name was so great that it could even be used to force other unwanted products on retailers. But in this case, the Commission adopted a completely opposite view, holding that Consolidated could threaten to refuse to buy these products having established brand names.

Gentry's major sales have consistently been to the large food companies where Consolidated buys a small portion of the suppliers' output and where the supplier most often sells products which Consolidated must carry. Those companies include such well-known names as Lipton, Hunt Foods, American Home Foods (Chef Boy-Ar-Dee), California Packing Corporation (Del Monte), R. T. French, Durkee's Famous Foods and H. J. Heinz, to name just a few.

The Government argues that in any event consumer demand would not affect the availability of reciprocity pressures for a "large part" of Consolidated's suppliers since there are many who process for Consolidated under its own private label brands. (Br. 45) But only 20% of Consolidated's purchases were of products carrying Consolidated's private labels (R. 1743), and many of these purchases were from large food processing companies that also sold advertised label products. (See, *e.g.*, Reciprocity Supplement, pages 5, 57, 66, 73.) For the reasons that have been given, such companies are much more likely to coerce than to be coerced. Further, we have shown (page 47) that even Consolidated's private label packers did not succumb to reciprocity.

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[22] The food industry is second only to the tobacco industry in advertising expenditures. Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract 847 (1964).

The Disadvantages of Reciprocity

Practically all writers on the subject recognize that there are real business disadvantages to reciprocity. The importance of these disadvantages is that they will operate on businessmen to prevent them from yielding to reciprocity attempts, and this record shows that they do not yield. To assume that reciprocity will consistently work in any substantial number of businesses is to assume that executives and purchasing officials will consistently blind themselves to the way in which the practice can harm their business. This is not a realistic assumption, particularly among food processors who operate on low profit margins and where price and quality considerations are all important.

Reciprocity, if accepted, can deprive purchasing agents of a free choice of suppliers. Competitors of the reciprocity-favored supplier may simply stop calling, and the buyer will be deprived of competitive offers and supplier assistance. Choice of one supplier can lead to a lack of willingness by others to provide ingredients in a time of critical shortages or when the reciprocity-favored supplier has inadequate production or has production stopped by a strike. (See, *e.g.*, Reciprocity Supplement, pages 93, 101-102, 104.)

There is a complete discussion of the good business reasons for not acceding to reciprocity requests in Ammer, Realistic Reciprocity, 40 Harv.Bus.Rev. 116, 122-123 (1962), and Sloane, Reciprocity: Where Does the P.A. Stand? Purchasing, November 20, 1961, 70, 78-79. One author states that reciprocity, even where practiced, is self-defeating:

> "Many [companies] may find it is a costly and unruly beast, but that experience should be their

privilege. There seems, indeed, to be an awareness in purchasing circles that reciprocity can saddle higher costs and poorer quality on a company pursuing this course. To the extent that these things are recognized, reciprocity may contain the seeds of its own destruction. At the least, it indicates that there is an avenue of self-correction for what is, at most, an arrangement terminable at will." (Harsha, The Conglomerate Merger and Reciprocity—Condemned by Conjecture? 9 Antitrust Bull. 201, 211-212 (1964))

Since the disadvantages of reciprocal buying are certain to have an impact on its acceptance, this is one more factor that must be considered in assessing the probability that purchases will automatically get sales.

What Happens When Price, Service and Quality Are Equal?

The Government argues that reciprocity will at least be effective when price, service and quality are equal. (Br. 38-39) But price, service and quality are hardly ever equal in a competitive industry such as this. Perfect equality is a textbook theory, not a marketplace reality. Even the author on which the Government relies most heavily, and who speculates about reciprocity effect, recognizes this fact of business life:

> "Thus, all other factors being equal (*as they almost never are*), companies with very high trade relations potential in various industries will tend to do business with each other." (Ammer, Realistic Reciprocity, 40 Harv.Bus.Rev. 116, 119 (1962); emphasis added)

Another author puts it this way:

> "If 'all other things are equal' as between several sources of supply, then reciprocity can logically be

practiced (see example 1). *But all other things are rarely equal.*" (Teeple, The P.A. Faces Reciprocity, Purchasing, January, 1955, 81, 83; emphasis added)

The record bears out these authors' views. As the evidence summarized in the Reciprocity Supplement shows, one or more of price, service and quality factors were continually varying among the onion and garlic suppliers, and there is no reason to believe that this intensely competitive picture will be altered in the future.

Further, there is no proven probability that reciprocity will operate even where price, service and quality are equal; the Government's argument that it will is sheer speculation, unsupported by the record, and clearly inconsistent with the Section 7 test of probable substantial effect. We note that even in those rare instances where price, service and quality are equal, there remain the purchasing agent's dislike of reciprocity,[23] the very real disadvantages of accepting reciprocity, the existence of consumer demand and the other factors discussed earlier which are certain to play an inhibiting role.

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[23] Dr. Prater, Gentry's President, put it this way:

"We deal with purchasing agents who are very jealous of their prerogatives, and they resent any approach based on any reference to Consolidated. * * * They are all very jealous of the prerogatives, and they are very conscious of buying on quality, and they like price. They want good service, and they don't want anybody telling them how to run their business." (R. 1481-1482)

The writers on reciprocity confirm this view. See, Lewis, The Present Status of Reciprocity as a Sales Policy, 16 Harv.Bus.Rev. 299, 300 (1938); Sloane, Reciprocity: Where Does the P. A. Stand? Purchasing, November 20, 1961, 70, 77-78.

Finally, we note that the five examples cited by the Government do not prove its point on this issue. (Br. 37-38) All the Government relies on are speculative statements that Gentry would be given preference if price, service and quality were equal. But at not one of those companies did Gentry obtain any business because of Consolidated's purchases. (See discussion at page 39.)

Summary of Reasons for the Lack of Reciprocal Buying

We have described in this section a few of the reasons why a universal assumption as to reciprocal buying is not valid. There are undoubtedly others, depending upon the peculiar circumstances of the businesses involved. The real importance of these factors is that they show the need for an inquiry into not only market structure but also market behavior in measuring any alleged reciprocity power.

The Government states that "evidence establishing that reciprocal buying was, in fact, impossible in the relevant industry would be material and admissible." (Br. 49) Surely, it must be true that the evidence in this record establishing that reciprocal buying is improbable in the relevant industry must be material and admissible in a Section 7 case where, as the Government and the courts have repeatedly said, the concern is with probabilities, not possibilities.

IV.

THE LACK OF LEGAL KINSHIP BETWEEN RECIPROCITY AND VERTICAL ARRANGEMENTS

In arguing for the conclusion that Consolidated's acquisition of Gentry was unlawful, the Government (Br. 17; R. 1407, 1412-1413, 1417-1418) and the *amicus curiae* (Trabon Br. 6, 9) compare reciprocity to vertical integration by ownership (vertical mergers) and by contract (requirements contracts and tying agreements). However, the Government has only focused on seeming similarities between reciprocity and the named vertical arrangements; a useful comparison must also take into account the dissimilarities.[24] And any discussion of this subject must recognize that we are here dealing with a Section 7 attack on a merger which allegedly created a reciprocity power, not with the legality of reciprocity agreements or coercive reciprocity under the Sherman Act or Section 5 of the Federal Trade Commission Act. Section 7, unlike the other statutes, requires proof of probable substantial effect.

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[24] The *amicus curiae* also prefers to overlook the dissimilarities. For example, on page 6 of its brief Trabon quotes a law review discussion of the similarities of integration by contract and by ownership. Omitted from the lengthy quotation is the very next sentence where the authors state:

> "* * * * But important differences may attend the two devices—differences in business effectiveness and in legal consequences." (Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 2 (1959))

Reciprocity Differs From Vertical Mergers and Requirements Contracts

The foreclosure effect of vertical mergers is open, immediate and decisive: Open, because it can easily be determined that a vertical merger has taken place; immediate, because the market foreclosure (which can be determined by examining the market shares involved) is an automatic result of the merger; and decisive, because the foreclosure is "permanent and irreversible." *Brown Shoe Co.* v. *United States,* 370 U.S. 294, 332 n. 55 (1962)[25] Requirements contracts, like vertical acquisitions, also act openly (their existence is clear) and immediately (foreclosure is automatic). In addition, although they are not as permanent as vertical mergers, control (and foreclosure) is complete throughout the life of the contract.

To borrow a picturesque phrase used by Judge Yankwich in his district court opinion in *Standard Oil Co.* v. *United States,* 337 U.S. 293 (1949), the market foreclosure fence created by these vertical arrangements is "horse-high, bull-strong, and hog-tight."[26]

Reciprocity, on the other hand, is certainly less permanent and much more obscure. Absent express reciprocal buying agreements (not involved in this case), it is difficult to know simply from the fact of purchases that they stemmed from reciprocity. The mere fact that, for example, General Foods sold dog food to Consolidated and is also a purchaser

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[25] See also *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 366 (1963), and *Inland Container Corp.,* CCH Trade Reg. Rep. ¶ 17,012 (1964).

[26] The decision is unreported but Judge Yankwich's remark is quoted in 22 A.B.A. Section of Antitrust Law (1963), p. 20.

from Gentry does not prove that General Foods' purchases were motivated in any way by reciprocity.

Moreover, a reciprocity approach is a selling device, a sales argument. In assessing a reciprocity approach, the buyer will consider whether or not it is in the company's short-run or long-run interest to pay any attention to it. He will also take into account other competitive factors such as price, service and quality, and this is even more true in the intensely competitive food industry than it may be in other markets. This was demonstrated over and over again in this record in the testimony by purchasing agents of large and small companies.

Finally, in contrast to the permanence of vertical acquisitions and the life-of-the-contract effect of vertical contractual arrangements, reciprocity, to be substantially effective (and in an acquisition setting, illegality requires proof of substantiality), must re-assert itself continuously. Even if a buyer should in a rare instance consider reciprocity along with price, service and quality and place an order with the reciprocity-talking salesman, the decision governs only that order. When the salesman returns, the buyer may decide not to place another order because prices have changed, because a competitor has a slightly better product, because service was poor or for any one or more of a variety of reasons that may affect the on-the-spot decisions of a buyer.

Thus, unless a company's reciprocity-inducing power is overwhelming (as it was in all of the cases decided by the Commission under Section 5 of the Federal Trade Commission Act,[27] but certainly was not proved to be here), a customer can and will reconsider whether to be influenced by

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[27] *Waugh Equipment Co.*, 15 F.T.C. 232 (1931); *Mechanical Manufacturing Co.*, 16 F.T.C. 67 (1932); *California Packing Co.*, 25 F.T.C. 379 (1937).

reciprocity with each purchase, thereby bringing into play all of the limitations of reciprocity. To the extent that there is only limited reciprocity power, its effect will be little more than that of a spot-market transaction. Kessler and Stern put it this way:

> "Contractual arrangements aiming at vertical integration extend over a wide range, verging at one extreme on the permanence and control of ownership integration, and at the other approaching the impermanence and lack of control of the spot-market transaction." (Kessler & Stern, Competition, Contract, and Vertical Integration, 69 Yale L.J. 1, 2 n. 3 (1959))

The Tying Agreements Analogy Is Wide of the Mark

It is the tying agreement which the Government (Br. 17) and the *amicus curiae* (Trabon Br. 6) claim is most closely analogous to reciprocity. In view of the fact that tying agreements are argued by some to be illegal *per se* (actually, they are not[28]), this analogy is intended to inject an odor of unlawfulness into the atmosphere in which Consolidated's acquisition of Gentry must be examined. But to argue that because reciprocity may produce sales in one market as a result of leverage exerted in another market it is analogous to a tying contract is only to start and not end the comparsion between the two.

As this Court stated in *United States* v. *Loew's Inc.*, 371 U.S. 38, 45 (1962), the "standard of illegality" for tying agreements is that the seller must have " 'sufficient economic

[28] See *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 330 (1962); *United States* v. *Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961).

power with respect to the tying product to appreciably restrain free competition in the market for the tied product • • •.'" This standard can much more easily be applied to tying agreements than to reciprocity since tying agreements present a convenient case for the ascertainment of market power—the very existence of the tying agreement almost always demonstrates that the requisite economic power (a dominant market position or uniqueness of the tying product) is present.[29] This is so because a tie-in is a useless device unless the seller does have economic power over the tying product.[30] As the Court said in *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 7 (1958):

> "[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

The real analogy with the tying situation is that just as a tying agreement cannot be presumed from the fact that a company purchases two different items from the same company, so also reciprocity cannot be presumed from the fact that a company makes a purchase from a customer.

An additional failing of the Government's analogy to tying agreements is that it obscures the fact that this case

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[29] *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 7-8 (1958); Lockhart & Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv.L.Rev. 913, 944-945, 952 (1952); Kaysen & Turner, Antitrust Policy (1959), 146-147.

[30] *Times-Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 605 (1953); Rep. of Attorney General's National Committee to Study the Antitrust Laws (1955); Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 31 (1957).

presents the question whether an acquisition is unlawful because of reciprocity opportunity. A Section 7 reciprocity case presents a much more difficult issue of substantiality than does a tying agreement.

The foregoing comparison of an acquisition creating a reciprocity opportunity and tying agreements (as well as other forms of vertical arrangements) spotlights a critical difference which goes to the heart of this case. The distinction is that this case presents an entirely new line of inquiry. The Government and the courts know that they have a vertical arrangement in a case involving a vertical acquisition, a requirements contract, or a tying agreement and the only question is whether its effect is such as to be unlawful; here, the only starting point is simply the fact that some companies can or do both buy from and sell to Consolidated. Before effect (and therefore the existence of a vertical arrangement) can be determined in this case, it must first be determined that there is effective reciprocity power. And there is nowhere to look except in the record to determine whether the power exists and whether it will probably have substantial anticompetitive consequences.

The Commission's Analysis Is at Variance With This Court's Standards

The Commission's analysis is totally inconsistent with the approach taken by this Court in vertical integration cases. As contrasted with the Commission's presumption of market power, this Court has moved carefully and with restraint even when the existence of a vertical arrangement and the amount of foreclosure is known. In *Brown Shoe Co. v. United States,* 370 U.S. 294, 321-322 (1962), the Court avoided any sweeping rules of illegality and stated that a merger must be "functionally viewed, in the context of its particular industry." The Court concluded that even the size of the share of the market foreclosed, although an im-

portant consideration, would "seldom be determinative." (370 U.S. at 328)

In *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), this Court rejected an argument that simply because of the fact that a twenty-year requirements contract covered coal having an aggregate value of $128,000,000, "the volume of preemption overwhelmingly" satisfied Section 3 of the Clayton Act. (Brief for Respondents, p. 10) The Court said that "a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." (365 U.S. at 329)

And in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963), the case which has been said to come the closest to a *per se* rule under Section 7[31]—in the context of a horizontal merger with market shares easily ascertainable—this Court was careful to say that a merger producing a firm with control of an undue percentage share of the relevant market and resulting in a significant increase in concentration is inherently anticompetitive and must be enjoined "in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." (374 U.S. at 363)

Here, the Commission not only lacked persuasive evidence of market power (let alone the degree of market foreclosure), but it refused to give serious consideration to evidence that there was no market power. In the words of one commentator:

> "That the rules and principles which the enforcement agencies would apply to conglomerate mergers are stricter and more inflexible in operation than what the Supreme Court has established for

[31] von Kalinowski, The Per Se Doctrine—An Emerging Philosophy of Antitrust Law, 11 U.C.L.A. L. Rev. 569, 586 (1964).

horizontal mergers is a curious development indeed." (Asper, Reciprocity, Purchasing Power and Competition, 48 Minn.L.Rev. 523, 545 (1964))

Our view of the arbitrary nature of the Commission's decision in this case is confirmed by others:

"It is apparent to me, after careful study of the *Consolidated Foods* decision, that it articulates a new rule of virtual per se illegality applicable to conglomerate acquisitions where there is an opportunity for reciprocal purchasing. • • •

"I cannot believe, however, that we shall always continue to ignore the wise teachings of such titans as Brandeis and Learned Hand. *It was Brandeis who urged that there must be in every case a 'factual showing of illegality.'*" (Handler, Emerging Antitrust Issues: Reciprocity, Diversification and Joint Ventures, 49 Va. L.Rev. 433, 439, 447 (1963); emphasis added)

• • •

"To determine whether diversification, by merger or otherwise, is conducive to reciprocal dealing requires the very examination of complex market conditions which per se rules are intended to make unnecessary." (Hausman, Reciprocal Dealing and the Antitrust Law, 77 Harv.L.Rev. 873, 882-883 (1964))

• • •

"It follows that a careful economic analysis must be made in each case involving a charge of reciprocity to ascertain if the defendant in fact has power or leverage to influence its suppliers." (Krash, The Legality of Reciprocity Under Section 7 of the Clayton Act, 9 Antitrust Bull. 93, 98 (1964))

Finally, we note that the rationale of the Commission in this case is inconsistent even with its own view of Section 7. Thus, in the second *Procter & Gamble* case, decided after this case, the Commission said:

> "In every Section 7 proceeding, the burden is on the complainant to prove that the merger will create a reasonable probability of a substantial lessening of competition or tendency to create a monopoly. *This burden is not met, in any case, by invocation of a talismanic per se rule by which to dispense with the need for adducing evidence of probable anti-competitive effect.* Congress declared neither that all mergers, nor that mergers of a particular size or type, are *per se* unlawful. In every case the determination of illegality, if made, must rest upon specific facts." (*Procter & Gamble Co.*, CCH Trade Reg. Rep ¶ 16,673 at 21,568 (1963); emphasis added)

It is difficult to see how the Commission did any more in this case than apply "a talismanic *per se* rule" which not only dispensed with but ignored the evidence relating to probability of substantial effect.

The Significance of Post-Acquisition Evidence

The second implication of the fact that a new inquiry is required in this case—an inquiry into the existence of effective reciprocity power—is that just because certain facts may be considered irrelevant or insignificant in cases involving vertical or horizontal arrangements does not mean that they should be considered irrelevant or insignificant here.

In spite of a start in the other direction (*Procter & Gam-*

ble Co., 58 F.T.C. 1203 (1961),[32] the Commission has now concluded that post-acquisition evidence is of little relevance in Section 7 cases. (*Procter & Gamble Co.*, CCH Trade Reg. Rep. ¶ 16,673 (1963); *Ekco Products Co.*, CCH Trade Reg. Rep. ¶ 16,879 (1964))

As the *Ekco* case demonstrates, however, the Commission does consider post-acquisition evidence helpful where it indicates that an acquisition is unlawful. As one commentator has observed, this is a "'heads-I-win-tails-you-lose' approach." (Day, Conglomerate Mergers and "The Curse of Bigness," 42 N.C.L.Rev. 511, 554 (1964))

Whether or not the Commission's position is sound when there is a vertical or horizontal acquisition is one thing. Whether or not it is sound when the question is whether effective reciprocity power actually exists is quite another matter.[33] As we have said, the question whether an acquisi-

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[32] Commissioner Anderson was the only member of the Commission at the time of the first *Procter & Gamble* decision who participated in the decision here, and he dissented. In remanding the case to the Hearing Examiner for additional evidence in the first *Procter & Gamble* decision, the Commission said: "[T]his disposition of the matter, providing as it will a more complete and detailed post-acquisition picture, has the advantage of allowing the Commission an informed hindsight upon which it can act, rather than placing too strong a reliance upon treacherous conjecture." (58 F.T.C. 1203 at 1207)

[33] The *amicus curiae* errs in stating that *United States* v. *Ingersoll-Rand*, 320 F.2d 509 (3rd Cir. 1963), "discounted the importance of post-acquisition evidence." (Trabon Br. 7) That case arose on the Government's request for a preliminary injunction blocking the merger. The Court of Appeals' finding as to reciprocity was admittedly speculative and the court expressly said that its opinion was "precatory" and that after final hearing and introduction of the defense, the facts "may appear of different substance and texture." (320 F.2d at 523-524)

tion will produce substantial reciprocal buying is not easy to answer. For the Commission to profess such a grasp of the problem as to warrant rejection of performance data in favor of a prophecy based primarily on the "opportunity" for reciprocal buying created by the market structure is at least surprising.

Equally remarkable is the statement in the Government's brief that in a Section 7 case:

> "• • • [T]he emphasis must be on evidence of market structure rather than on evidence of market behavior." (Br. 47)

The two types of evidence are not mutually exclusive. Evidence of market behavior is evidence of market structure. As the Report of the Attorney General's National Committee To Study the Antitrust Laws (1955), p. 315, states:

> "• • • [I]t is often impossible to show the precise effect which a given course of conduct may have upon competition. Hence, relevant facts or experience from which it may logically be concluded that a given effect resulted, or is likely to result, become the basis for the determination of ultimate fact. • • • While economic prediction as to the market consequences of certain conduct often can be of use as evidence (where judicial interpretation requires it), it is persuasive only in the absence of evidence of actual market behavior."

The problem of predicting performance from market structure has long been troublesome. Kaysen and Turner concluded:

> "We can neither predict market performance from market structure, nor can we tell from struc-

> ture alone how competitive the processes of the market are. A major consequence of the gaps in our knowledge is that our conclusions about the functioning of any concrete market depend on the joint study of both structure and performance. We cannot determine what structure is without examining certain aspects of performance." (Kaysen & Turner, Antitrust Policy (1959), at 60-61)[34]

Here, evidence of actual market behavior is present. The Government argues, however, that such post-acquisition evidence is unreliable because a company can make a record of "good behavior" to forestall antitrust attack. This is the "sheathed sword" line of reasoning. (*Procter & Gamble Co.*, CCH Trade Reg. Rep. ¶ 16,673, at 21,574 (1963)) As the Government (Br. 48), but not the *amicus curiae* (Trabon Br. 20-21), seems to recognize, this reasoning is not applicable here. Consolidated's sword is, by the Government's own argument, unsheathable; "tacit accommodative reciprocity" should have operated whether or not Consolidated said anything. Moreover, the record is replete with evidence that Consolidated tried to wield the "overt reciprocity" sword, but to no avail.

The difficulties attendant upon determining whether a conglomerate merger has anticompetitive effects has led some commentators to advocate a "wait and see" approach,[35] just as the Commission adopted in its first *Procter & Gamble* decision. Although the practicability of such a general rule may be questionable and we do not advocate it here, surely once you have waited you should be able to see. This

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[34] Bock argues that any distinction between structural and nonstructural market factors is artificial. (Bock, Mergers and Markets, 206 (3d ed. 1964))

[35] Harsha, The Conglomerate Merger and Reciprocity — Condemned by Conjecture? 9 Antitrust Bull. 201, 227 (1964).

Court clearly did so in *United States* v. *duPont & Co.*, 353 U.S. 586 (1957). The point is that the Government should do the best that it can with what it has. The fact that it (or the private treble-damage litigant) may not always have post-acquisition evidence does not mean that it should not use it when it does. The purpose of antitrust enforcement is to achieve sound results, not symmetry for its own sake.

The Commission's disdain of the post-acquisition evidence in this case is all the more surprising in view of its lack of experience with reciprocity. Judicial precedents, empirical data and economic analysis with respect to reciprocity are sorely lacking. Reciprocity has been considered by the Federal Trade Commission on only three occasions—each of which involved an extreme case (see page 62). Even Stocking and Mueller, the economists on whom the Government relies repeatedly (Br. 18, 19, 20), admit the lack of knowledge about reciprocity:

> "The silence of economists on this practice no doubt reflects lack of information about it." (Stocking & Mueller, Business Reciprocity and the Size of Firms, 30 J.Bus.U.Chi. 73, 74 (1957))

But despite the paucity of judicial experience and expert study of effect, the Government now urges that in this—the first case involving reciprocity under Section 7 of the Clayton Act—it has sufficient knowledge of the economic factors pertaining to reciprocity to permit it simply to ignore evidence of what actually did happen during an eight-year period when, at the very least, "tacit accommodative reciprocity" should have been fully operative.

This attitude should be contrasted with the approach taken by the Federal Trade Commission during the evolution of the law with respect to tying agreements. Thus, even after both the courts and the Commission had had substantial experience with tying agreements, the Commission

insisted upon giving consideration to evidence of economic effect.[36] In *Insto-Gas Corp.*, 51 F.T.C. 363 (1954), a tying agreement case, the Commission said:

> "To apply the foregoing tests of illegality to the record in the instant case would be an application of legal doctrine to a factual vacuum.
>
> "* * * Our search of the record for that 'essence of illegality'— the wielding of monopolistic leverage—upon which to base some determination of a foreclosure has been in vain. *Foreclosure cannot be assumed; it must be demonstrated.*" (51 F.T.C. at 363; emphasis added)

However appropriate this language may have been in 1954 with respect to tying agreements, it is precisely in point in this case and articulates the vice of the Commission's decision which was properly recognized by the Seventh Circuit:

> "Probability can best be gauged by what the past has taught. We are convinced that the Commission has mistakenly rejected what the record demonstrates as to the past in favor of a future possibility based on conjecture and speculation." (R. 2693)

Or, to use the words of Mr. Justice Holmes:

> "A page of history is worth a volume of logic." (*New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921))

CONCLUSION

The question presented by the Government is whether the Consolidated-Gentry merger violates Section 7 because the merger renders it probable that reciprocal buying will foreclose Gentry's competitors from a substantial part of

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[36] See *The Maico Co.*, 50 F.T.C. 485 (1953).

the market consisting of food processors supplying Consolidated. (Br. 2)

This record is devoid of evidence showing that Consolidated's purchases from food suppliers have resulted or probably will result in any substantial market foreclosure. As we have demonstrated, the Government's proof and arguments are bottomed on speculation and possibility of some effect rather than probability of substantial effect and thus are not consistent with the test imposed by Section 7 of the Clayton Act as interpreted by this Court.

Respectfully submitted,

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